

**IMMEDIATE STAY REQUESTED**

**CIVIL COURT OF APPEAL CASE NO. \_\_\_\_\_**

**COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT**

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**BIRNBAUM & GODKIN, LLP, GROSS & KLEIN, LLP,**

*Petitioners,*

v.

**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN MATEO,**

*Respondent;*

**FACEBOOK, INC., et al.,**

*Defendants and Real Party in Interest.*

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**FROM THE SUPERIOR COURT, COUNTY OF SAN MATEO,  
CASE NO. CIV 533328**

**Honorable V. Raymond Swope, (650) 261-5123**

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**PETITION FOR PEREMPTORY WRIT OF PROHIBITION OR OTHER  
APPROPRIATE RELIEF, AND REQUEST FOR IMMEDIATE STAY;  
MEMORANDUM OF POINTS AND AUTHORITIES; [SUPPORTING  
EXHIBITS FILED CONCURRENTLY HEREWITHE]**

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State of California  
Court of Appeal  
First Appellate District

## **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Court of Appeal Case Number: \_\_\_\_\_  
Superior Court Case Number: CIV 533328

Appellant/Petitioner: Birnbaum & Godkin, LLP

### Respondent/Real Party in Interest:

This Certificate is submitted on behalf of the following party:

## BIRNBAUM & GODKIN, LLP

(Check if applicable):

INITIAL CERTIFICATE  SUPPLEMENTAL CERTIFICATE

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

Interested entities or persons required to be listed under rule 8.208:

Entity or Person (List in order of importance).	Defendant
1.	Defendant
2.	Defendant
3.	Defendant
4.	Defendant
5.	Defendant
6.	Defendant
7.	Plaintiff

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Party Represented: Birnbaum & Godkin, LLP, Petitioner  
Date: April 10, 2019 /s/ James A. Murphy  
Signature of Attorney or Party

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT:

In this timely, verified petition, Petitioners Birnbaum & Godkin, LLP and Gross & Klein, LLP (“Petitioners”), whose client is Plaintiff Six4Three, LLC (“Six4Three”), seek a peremptory writ of mandate, prohibition, or other extraordinary writ to compel respondent, the Superior Court of San Mateo County, to stay this action, specifically any orders of the Superior Court that require Petitioners to perform legal services on behalf of their client, Six4Three or related to Six4Three, while their motions to be relieved as counsel for Six4Three are under submission by the Superior Court. The Superior Court’s decision on the motions to be relieved as counsel because of a conflict of interest are due by June 11, 2019. The Superior Court denied Petitioners’ request to stay the proceedings, including the requirement to represent Six4Three in connection with reopened discovery, pending the Superior Court’s ruling on Petitioners’ motions to be relieved as counsel. Tellingly, Petitioners’ client, Six4Three, did not oppose the motions to be relieved as counsel. Facebook was the only party to oppose the motions. Petitioners have an unwaivable conflict of interest in their representation of Six4Three that mandates withdrawal as counsel, and as long as Petitioners are required to remain as attorney of record for Six4Three, they taint the

proceedings below and prejudice Six4Three's ability to mount an effective prosecution in the court below.

A writ of mandate or other stay order should therefore issue to stay the proceedings below while this Court addresses whether the Superior Court should have granted Petitioners' request for stay of the proceedings while the Petitioners' motions to be relieved as counsel are under submission by the Superior Court. Petitioners seek an order staying this action, including all discovery directed to them or Six4Three, until the Superior Court rules on Petitioners' motions to be relieved as counsel, which were taken under submission by the Superior Court on March 13, 2019.

**PETITION FOR WRIT OF MANDATE, PROHIBITION OR  
OTHER APPROPRIATE STAY ORDER**

**I. The Parties**

1. Petitioners Birnbaum & Godkin, LLP ("B&G") and Gross & Klein, LLP ("G&K"; collectively "Counsel" or "Petitioners") are counsel of record for Plaintiff Six4Three, LLC ("Six4Three") in an action pending in Respondent Superior Court of the State of California for the County of San Mateo ("Superior Court"), entitled *Six4Three, LLC, a Delaware Limited Liability Company v. Facebook, Inc., a Delaware Corporation, Mark Zuckerberg, an individual, Christopher Cox, an individual, Javier Olivan, an individual, Samuel Lessin, an individual, Michael Vernal, an individual, Ilya Sukhar, an individual, and Does 1-50, inclusive*, Case No. CIV533328.

2. Real Parties in Interest Facebook, Inc. (“Facebook”), Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal and Ilya Sukhar (collectively “Defendants”) are the defendants named in the action described above.

3. Respondent Superior Court is now and at all times mentioned in this Petition, has been a court exercising judicial functions in connection with the action described above.

## **II. Timeliness Of Petition**

4. The Superior Court took Petitioners’ motions to be relieved as counsel under submission on March 13, 2019. The Minute Order from the hearing states that the Superior Court’s decision is due on June 11, 2019, thus establishing that the Superior Court recognized its ability take substantial time to issue a decision on the motions.

5. The Superior Court issued its order granting in part and denying in part, Facebook’s Motion to Open Discovery and to Compel (“Motion to Open Discovery”) on March 15, 2019 (Petitioners’ Appendix (“PA”), 000527 to 000546.) Thus, while Petitioners’ motions to be relieved as counsel based on an unwaivable conflict were under submission, the Superior Court reopened discovery in the action, while it was stayed pending the appeal of the Superior Court’s rulings on anti-SLAPP motions. The Superior Court’s order on Facebook’s Motion to Open Discovery forces Petitioners to continue to represent Six4Three, even though they are

conflicted and cannot do so ethically, and effectively forces Petitioners to violate Rule 1.16(a)(2) of the California Rules of Professional Conduct.

6. On March 27, 2019, Petitioners filed an Ex Parte Application to Stay Discovery pursuant to the March 15th order granting, in part, and denying, in part, Facebook's Motion to Open Discovery pending the Superior Court's decision on Petitioners' motion to withdraw as counsel for Six4Three. (PA 000549-000558.) On April 2, 2019, the Superior Court denied the ex parte application. (PA 000640- 000643.) Although Petitioners are legally and ethically barred by an unwaivable conflict from advising or representing Six4Three, the Superior Court has issued multiple orders that require action by Six4Three, and thus that require Petitioners to provide legal representation and advice to Six4Three. (PA 000517-000548, 000564-000595, 000640-0646.) Petitioners are in an untenable position that can only be remedied by their being relieved as counsel for Six4Three. To prevent any further prejudice to Six4Three, including the conflicted representation by Petitioners, a stay of this action is required until the Superior Court rules on the motions to be relieved as counsel. Petitioners are filing this petition as soon as reasonably practicable since receiving the Superior Court's order denying their application for a stay.

7. When Petitioners are relieved as counsel for Six4Three, Six4Three can engage new, unconflicted counsel to represent its interests in connection with the Superior Court's finding that Facebook established a

prima facie showing that the crime-fraud exception to the attorney client privilege applies. Likewise, Petitioners can represent their own interests without the presence of a conflict.

### **III. Authenticity Of Exhibits**

8. All documents in Petitioners' Appendix accompanying this petition are true and correct copies of original documents filed with the San Mateo County Superior Court, except pages PA-000001 to PA-000280, which is the complete register of actions from the San Mateo County Superior Court website.

9. The citations to Petitioners' Appendix are incorporated by reference as though fully set forth in this petition, and reproduced in their entirety in the concurrently filed Petitioners' Appendix in Support of Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief. The exhibits are paginated consecutively, and page references in this petition are to the consecutive pagination.

10. Because the request for stay was heard ex parte and submitted on the papers, there is no reporter's transcript. The written ruling is provided.

11. This petition does not reveal the contents of any documents sealed by the Superior Court. It is therefore openly filed. (Cal. Rules of Court, Rule 8.46(d)(9).)

#### **IV. Summary Of Material Facts**

##### **A. Six4Three's Action Against Facebook**

12. Six4Three filed this action against Facebook on April 10, 2015, seeking damages for Facebook's unfair and unlawful business practices in using the Facebook Platform as a "bait and switch" scheme in violation of California's Unfair Competition Law and intentionally interfering with Six4Three's contracts with customers and prospective customers. (PA-000006.) Six4Three alleges that Facebook engaged in a scheme to lure software developers such as Six4Three into developing mobile applications for use on Facebook, thereby helping Facebook to grow its number of users, to enhance the user experience, and to generate additional advertising revenue, but once those goals were achieved, Facebook cancelled the developers' access to its user data so that Facebook could create its own competing applications or award contracts to only select companies who agreed to pay for additional services from Facebook. By cancelling Six4Three's access to the data upon which it had built its app, Facebook succeeded in putting Six4Three out of business.

13. The operative Fifth Amended Complaint ("FAC") was filed on January 12, 2018 alleging causes of action for violation of Business and Professions Code §§ 17200 *et seq.*, breach of contract, concealment, intentional misrepresentation, negligent misrepresentation, intentional interference with contract, intentional interference with prospective

economic relations, and negligent interference with prospective economic relations.

14. On October 25, 2016, the parties entered into a stipulated protective order (“Protective Order”). The Protective Order states that “[a]ny party or non-party may designate as Confidential Information ... any document or response to discovery which that party or non-party considers in good faith to contain information involving trade secrets, confidential business, financial, or personal information ... and any information that is not otherwise available to the public, subject to protection under Rules 2.550, 2.551, 2.580, 8.160, and 8.490 of the California Rule of Court or under provisions of California Law.” (PA 000056, 000454-000467.) The same standard applies for designating information as Highly Confidential. Confidential Information can be disclosed to counsel, employees of counsel, individual parties or officers or employees of a party, consultants or expert witnesses, the court and court personnel, or a witness if said witness sign the Certification. (*Id.*) However, Highly Confidential Information is treated the same as Confidential Information, except that it shall not be disclosed to individual parties or director, officers or employees of a party, or to witnesses. (*Id.*)

15. On November 21, 2017, Facebook filed a Special Motion to Strike pursuant to Code of Civil Procedure § 425.16. On January 12, 2018, Six4Three filed its FAC which added Zuckerberg, Cox, Olivan, Lessin,

Vernal and Sukhar (the “Individual Defendants”) as defendants. On May 3, 2018, the Individual Defendants filed a Special Motion to Strike pursuant to Code of Civil Procedure § 425.16. When Six4Three filed its oppositions to the Special Motions to Strike, it included exhibits in support of the oppositions, some of which it lodged under conditional seal. Facebook moved to seal some of Six4Three’s exhibits. Six4Three opposed Facebook’s motions to seal. A number of third parties, including the New York Times Company, the Associated Press, WP Company LLC d/b/a The Washington Post, CNN, the Guardian, the Open Markets Institute, and Test Aankoop, sought and obtained leave to file amicus briefs in support of unsealing Facebook’s documents.

16. On July 16, 2018, the Superior Court denied Facebook’s Special Motion to Strike and granted the Individual Defendants’ Special Motion to Strike. (PA 000174-000175.) Facebook appealed the order denying its Special Motion to Strike on July 24, 2018, and on July 31, 2018, the Superior Court ruled that Facebook’s appeal automatically stayed all further proceedings on the merits of Six4Three’s causes of action. (PA 000175.) On September 19, 2018, Six4Three cross-appealed the order granting the Individual Defendants’ Special Motion to Strike. (PA 000181.) On October 31, 2018, the Superior Court ruled that most of Facebook’s confidential documents would remain under seal. (PA 000188.) On

December 27, 2018, Six4Three appealed the Superior Court's sealing orders.

All of the appeals are pending. (PA 000203.)<sup>1</sup>

#### **B. Facebook's Motion To Open Discovery**

17. This matter is stayed pending Facebook's appeal of the denial of its anti-SLAPP motion and Six4Three's related cross-appeal. During the stay, without Petitioners' knowledge, the founder and Managing Member of Six4Three, Theodore Kramer, disclosed confidential Facebook information pursuant to an order for production of documents issued by the Digital, Culture, Media and Sport Committee of the House of Commons of the United Kingdom Parliament ("DCMS") on November 21, 2018. Mr. Kramer notified Petitioners two days after the disclosure. Petitioners promptly notified Facebook of the disclosure pursuant to the stipulated Protective Order. Petitioners simultaneously notified the Superior Court of the disclosure.

18. In response, Facebook made certain allegations against both Six4Three and Petitioners regarding the disclosure of confidential

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<sup>1</sup> Six4Three is actively represented by counsel other than Petitioners in the two appeals of the orders on the Special Motions to Strike. G&K, as local counsel for Six4Three, is listed as counsel for Six4Three in all three appeals; B&G is also listed as counsel for Six4Three in Facebook's appeal of the order denying its Special Motion to Strike. In order to provide Six4Three an opportunity to find replacement counsel for the appeal of the sealing order, and because Petitioners have not been required to perform any substantive legal work in connection with the appeals, they have held off filing motions to be relieved as counsel in the appeals. However, it is anticipated that such motions will be imminently filed with this Court.

information. Facebook sought relief from the stay to conduct discovery directly against Six4Three and Petitioners, which the Superior Court initially granted, then vacated *sua sponte*. Six4Three stipulated to produce certain non-privileged documents requested by Facebook.

19. On January 8, 2019, Petitioners filed motions to be relieved as counsel for Six4Three on the basis that there was an unwaivable conflict of interest. (PA 000205-000206, 000281-000299, 000357-000379.) The motions to be relieved as counsel were unopposed by Six4Three. (PA 000380-000383.) However, Facebook opposed the motions. (PA 000332-000352, 000387-000391.) The very next day after Petitioners filed their motions to be relieved as counsel, Facebook filed a motion to open discovery and compel. Facebook sought to obtain discovery of privileged attorney-client communications between Petitioners and Six4Three, on the basis that the privilege had been waived pursuant to the crime-fraud exception and otherwise. (PA 000206, 000300-329.)

20. Following oral argument and on March 13, 2019, the Superior Court took Petitioners' motions to be relieved as counsel under submission. (PA 000477-000521.) The Superior Court's minute orders note that its decision is due on June 11, 2019. Two days later, the Superior Court ruled on Facebook's motion to open discovery and compel, finding that Facebook had made a *prima facie* showing that the crime-fraud exception applied, waiving the attorney-client privilege between Six4Three and Petitioners as

to communications concerning the disclosure of confidential information. (PA 000527-000546.) The Superior Court's order lifted for the limited purpose of conducting discovery regarding the disclosure of confidential information, including attorney-client communications between Six4Three and Petitioners.

21. The failure of the Superior Court to rule on Petitioners' motions to be relieved as counsel while at the same time reopening discovery into the very facts which formed the basis for the unwaivable conflict places Petitioners in the untenable dilemma position of being forced to act as counsel for Six4Three pursuant to the Superior Court orders, while a very real conflict prohibits Petitioners from ethically representing Six4Three.

22. In the context of Petitioners' motions to be relieved as counsel, the Superior Court has delayed ruling whether an unwaivable conflict exists between Six4Three and its counsel based on the alleged conspiracy to violate the court order. However, in granting Facebook's motion to open discovery, the Superior Court found that Facebook made a *prima facie* showing that the exact same alleged conspiracy and violation of the court order does exist.

23. On March 27, 2019, Petitioners filed an *Ex Parte* Application to Stay Discovery pursuant to the March 15th order granting, in part, and denying, in part, Facebook's Motion to Open Discovery, pending the Superior Court's decision on Petitioners' motions to withdraw as counsel for Six4Three. (PA 000549-000563.) On April 2, 2019, the Superior Court

denied the ex parte application. (PA 000640-000643.)<sup>2</sup> Although Petitioners are legally and ethically barred from advising or representing Six4Three due to an unwaivable conflict, the Superior Court has issued multiple orders that require action by Six4Three, and thus that require representation of Six4Three by Petitioners. (PA 000517-000548, 000564-000595, 000640-0646.) For example, Facebook has served Six4Three with a request for production of documents, and the Superior Court has ordered counsel for Six4Three and Facebook to meet and confer regarding the document request and appear at a discovery conference on April 26, 2019. (*Id.*) Facebook has also served deposition subpoenas seeking personal appearances and production of documents on Petitioners and on Mr. Kramer. (*Id.*) Petitioners are being forced to represent Six4Three in connection with the discovery and give legal advice, while simultaneously conflicted and/or potentially liable for sanctions for refusal to represent their client. In addition, Case Management Order No. 22 appointed a neutral third party forensic examiner. (PA 000644-000646.) The Superior Court has ordered Petitioners to meet and confer with Facebook concerning search terms, and Six4Three's counsel will have to review the documents extracted by the forensic examiner for privilege, which include attorney-client communications that formed the

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<sup>2</sup> In so ruling, the Superior Court further refused to allow Petitioners to provide the court with additional evidence of the unwaivable conflict between them and Six4Three.

alleged crime-fraud found by the Superior Court, thus solidifying the unwaivable conflict. The discovery conference is set for April 26, 2019, with a case management conference statement due prior to the conference. These are just examples of the legal services Petitioners must perform on behalf of Six4Three by the Superior Court's denial of the request for stay pending a ruling on the motions to be relieved as counsel. Petitioners are being forced to represent Six4Three, even though they are unquestionably conflicted, in order to prevent a default by Six4Three and to preserve Six4Three's rights. Petitioners had an unwaivable conflict of interest beginning when Mr. Kramer turned over Facebook's confidential information to the DCMS Committee. The conflict was exacerbated when Facebook accused Petitioners of engaging in a conspiracy with Six4Three to violate the Superior Court's Protective Order and other orders. And it is axiomatic that after the Superior Court found that Facebook made a *prima facie* showing that the crime-fraud exception applies, Petitioners cannot possibly defend their alleged co-conspirator, Six4Three consistent with their ethical obligations.

**V. Necessity For Writ Of Mandate, Prohibition, Or Other Appropriate Relief**

24. Petitioners seek extraordinary relief from this Court in the first instance, because, as will hereafter appear, there is not an adequate remedy at law, and the matters involved herein are of public and general interest to

the people of the State of California and to members of the State Bar of California; and Respondent has abused its discretion. This petition seeks to maintain the *status quo* by staying the proceeding below until the Superior Court decides the motions to be relieved as counsel under submission. Specifically, the petition seeks a writ of mandate, a writ of prohibition, and/or other appropriate relief in connection with the Superior Court's denial of Petitioners' request for stay pending determination of the motions to be relieved as counsel.

25. Writ relief is warranted under these circumstances because the Superior Court improperly denied Petitioners' request to stay the action while their motions to be relieved as counsel are under submission. Petitioners have a right to require the Superior Court to perform its duty. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274.)

26. Petitioners have no plain, speedy and adequate remedy at law. No immediate appeal lies from the March 15, 2019 order opening discovery, and the Superior Court has not yet ruled on Petitioners' motions to be relieved as counsel. Through the Superior Court's order, Facebook was granted the ability to request discovery of Six4Three and Petitioners' attorney-client privileged communications. Petitioners are required to perform legal services on behalf of Six4Three relating to the issue that resulted in the unwaivable conflict in the first place, namely the alleged

violation of the Protective Order and other orders and the Superior Court's finding that Facebook made a *prima facie* showing that the crime-fraud exception applies resulting in a waiver of the attorney-client privilege. Allowing proceedings in the Superior Court to continue while the motions to be relieved as counsel are under submission, and then attacking the order denying the request for stay is not an adequate remedy. At that point, Six4Three will have been forced to be represented by conflicted counsel on the issue that resulted in the conflict in the first place. This is a bell that cannot be un-rung. Thus, a writ is appropriate relief.

27. Further, Petitioners cannot file a motion for reconsideration, as no new facts or law are present. (Code Civ. Proc., § 1008.)

## **VI. Application For Stay**

28. The March 15, 2019 order grants Facebook the ability to seek discovery of attorney-client communications through document requests and subpoenas *duces tecum* and leaves open the possibility of allowing Facebook to depose Six4Three and Petitioners. Unless this Court stays the order of the Superior Court until it rules on Petitioners' motions to be relieved as counsel, Six4Three will be forced to be represented by conflicted counsel. There is no other means to protect the interests of Six4Three. If the stay is not granted then it will be represented by counsel that is conflicted based on the very issue that is the subject of the discovery by Facebook, namely the violation of the Protective Order and the finding of the crime-fraud exception. If

Petitioners are forced to continue to represent Six4Three, Six4Three may be irreparably damaged in this action and Petitioners will be in violation of the rules of Professional Conduct, and potentially subject to a malpractice claim.

29. A stay of the proceedings in the trial court is necessary and appropriate: to protect this appellate court's jurisdiction and ability to render an effective order on the writ; to avoid the potential for irreparable harm to Six4Three; because relief in the normal course of the writ is inadequate; because a stay was sought from and denied by the trial court; because the writ raises substantial questions and has merit.

30. The requested stay is of limited duration, as the Superior Court's decision on the motions to be relieved as counsel is due by June 11, 2019.

#### **PRAYER**

Petitioners therefore pray that this Court:

1. Issue a peremptory writ of mandate, prohibition, or other appropriate relief in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178) commanding respondent, the Superior Court of San Mateo County, in its Case No. CIV 533328 to stay all proceedings until it issues orders on Petitioners' motions to be relieved as counsel.

2. Or, if a peremptory writ is not issued in the first instance, issue an alternative writ directing respondent Superior Court as set forth in paragraph 1 above or show cause why it should not be compelled to do so.

3. Award Petitioners' costs pursuant to California Rules of Court, Rule 8.493.
4. And grant Petitioners such other extraordinary relief as may be appropriate and just.

DATED: April 10, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

By: /s/ James A. Murphy  
James A. Murphy  
Attorneys for Petitioner  
BIRNBAUM & GODKIN, LLP

## VERIFICATION

I, James A. Murphy, declare as follows:

1. I am an attorney at law duly admitted to practice in the State of California, and a Shareholder of the law firm Murphy, Pearson, Bradley & Feeney, counsel for Petitioners in this action.
2. I have read the foregoing Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief and know the contents thereof. I make this verification as petitioner's counsel because I am familiar with the facts relevant to this petition. The facts referred to in this petition are true based on my personal knowledge from my review of the pleadings, briefs, and other documents filed in the Superior Court.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on April 10, 2019, at San Francisco, California.

*James A. Murphy*  
James A. Murphy

## MEMORANDUM OF POINT AND AUTHORITIES

### I. INTRODUCTION

A lawyer cannot represent clients when there is an unwaivable conflict. (Cal. Rules of Professional Conduct, Rule 1.16(a)(2).) That is what Petitioners are being forced to do while the Superior Court has taken their motions to be relieved as counsel are under submission. Petitioners are being forced by the Superior Court, at the insistence of Facebook but not their clients, to perform legal services on behalf of Six4Three, as a result of several recent court orders entered while an order on the motions to be relieved as counsel remains pending.

Here, an unwaivable conflict exists between Petitioners and Six4Three. This is evident by the Superior Court's finding that Facebook made a *prima facie* case that Six4Three allegedly violated the Protective Order with the assistance of Petitioners, resulting in a finding that the attorney-client privilege is waived due to the crime-fraud exception. Petitioners are in an untenable position of having to defend Six4Three against these allegations while being accused as co-conspirators.

The remedy is clear: relieve Petitioners as counsel for Six4Three, and require Six4Three to engage new, unconflicted counsel to represent its interests. The Superior Court's refusal to grant a stay while it is deciding the motions to be relieved as counsel is the subject of this writ petition. Irreparable harm will result if Petitioners are forced to continue to represent

Six4Three while the motions to be relieved as counsel because of an unwaivable conflict are pending.

As discussed more fully below, this Court should stay the proceedings in the Superior Court to prevent irreparable harm to Six4Three and Petitioners that could result if Petitioners are forced to continue to represent Six4Three when there is an unwaivable conflict that lies at the very heart of the pending discovery in this matter by Facebook.

## II. LEGAL ARGUMENT

### A. **This Court has independent jurisdiction to preserve the status quo with a writ of mandate or other stay order:**

Pursuant to Code of Civil Procedure § 1085(a), "[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

Here, the Superior Court denied Petitioners' request to stay discovery pending the Superior Court's ruling on Petitioners' motions to be relieved as counsel. Petitioners request this Court vacate the order denying the request for stay and direct the Superior Court to stay the proceedings pending the determination of Petitioners' motions to be relieved as counsel to prevent

irreversible harm to Six4Three and Petitioners arising out the unwaivable conflict and the simultaneous requirement by the Superior Court to perform legal services by Petitioners on behalf of Six4Three.

A stay of the trial court proceedings is appropriate where a writ is pending on the ruling of motion to disqualify counsel<sup>3</sup>, since it may potentially infect all subsequent trial court proceedings. (See *Reed v. Sup. Ct. (Case Fin'l, Inc.)* (2001) 92 Cal.App.4th 448, 455 [where the order under challenge is the denial of a disqualification motion, “a reasonably persuasive showing that the claim of disqualification likely has merit will probably persuade the appellate court to stay the underlying proceedings . . . Courts of Appeal understand that prejudice occurs if the trial is not stayed pending an appeal of an arguably meritorious claim of disqualification.”]; and *Apple Computer, Inc. v. Sup. Ct. (Cagney)* (2005) 126 Cal.App.4th 1253, 1263-1264 [“The specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal.”].)

A motion to disqualify counsel is very much akin to the motion to be relieved as counsel at issue in this action, as both motions, although brought by different moving parties, seek the same remedy: the removal of a party’s

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<sup>3</sup> A ruling on a motion to disqualify counsel is directly appealable, but it may also be reviewable by writ on a showing why the appeal remedy would not be sufficiently speedy. (*Apple Computer, Inc. v. Sup. Ct. (Cagney)* (2005) 126 CA4th 1253, 1263-1264.)

legal counsel. Thus, the same arguments which justify a stay of the trial court proceedings pending a writ on a motion to disqualify counsel apply readily to this instance, where Petitioners are awaiting the Superior Court's ruling on their motion to be relieved as counsel due to an unwaivable conflict. As with *Reed* and *Apple Computer*, severe prejudice will indeed occur to Petitioners if the trial court proceedings are not stayed, and this has infected all subsequent trial court proceedings. Petitioners are being forced to provide legal advice and representation to Six4Three in the context of the Superior Court's order allowing discovery to proceed on the crime-fraud exception, while at the same time being unable to ethically serve as legal counsel for Six4Three due to the unwaivable conflict of being accused of being accused of being co-conspirators. Petitioners have been put in an impossible position by the Superior Court's orders, rendering them unable to effectively represent their clients, while at the same time forcing them into a direct breach of their ethical duties.

Moreover, the fact that the Superior Court has issued an order allowing the discovery of privileged attorney-client communications between Petitioners and Six4Three likewise makes a stay appropriate under these circumstances. (See *County of Los Angeles v. Sup.Ct. (Martinez)* (1990) 224 Cal.App.3d 1446, 1451 [if a trial court has granted a motion for discovery of privileged information, it is appropriate for the appellate court to stay the discovery order while considering the writ petition].)

A writ of mandate or other appropriate relief granting a stay of the proceedings while the Superior Court decides Petitioners' motion to be relieved as counsel is necessary to prevent irreversible harm to Petitioners' and their client, Six4Three, arising out of the current conflicted representation.

**B. Petitioners are conflicted from representing Six4Three in this action and if required to continue to represent Six4Three while the motions to be relieved as counsel are pending, they will be violating the Rules of Professional Conduct.**

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Petitioners were required to seek withdrawal as counsel pursuant to California Rules of Professional Conduct, Rule 1.16(a), which states that following:

Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;

(2) the lawyer knows or reasonably should know that the representation will result in violation of these rules or the State Bar Act;

Here, there was an allegation by Facebook that Petitioners were co-conspirators or aided and abetted Six4Three in violating the Protective Order and other orders when confidential Facebook information was disseminated

in London. The Superior Court later found that Facebook had made a *prima facie* showing that the crime-fraud exception to the attorney-client privilege. Petitioners' representation is inherently conflicted as a result and requiring Petitioners to continue to represent Six4Three in the face of this unwaivable conflict while the motions to be relieved as counsel are pending will not only grossly prejudice Six4Three, but will require Petitioners to violate the Rules of Professional Conduct. The Superior Court erred in denying Petitioners' *ex parte* application to stay the matter pending its determination of Petitioners' motions to be relieved as counsel. Thus, Petitioners request this Court to direct the Superior Court to vacate its order denying Petitioners' *ex parte* application to stay the matter and to make an order granting the motion. Petitioners further request that this Court grant a stay of any further proceedings while this writ is pending.

### **III. CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of *supercedens* or other order staying the proceedings in the trial court during the pendency of this writ; and order the Superior Court to vacate its order denying Petitioners' *ex parte* application for stay of discovery pending the Superior Court's decision on Petitioners' motions to

be relieved as counsel due to the inherent and unwaivable conflict of interest  
between Petitioners and their client, Six4Three.

DATED: April 10, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

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**CERTIFICATE OF WORD COUNT**

The text of this brief consists of 5,226 words as counted by the Microsoft Word processing program used to prepare this brief.

DATED: April 10, 2019

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**CERTIFICATE OF SERVICE**

I, Alice M. Kay, declare:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108. On April 10, 2019, I served the following document on the parties in the within action:

**PETITION FOR PEREMPTORY WRIT OF PROHIBITION, OR  
OTHER APPROPRIATE RELIEF AND REQUEST FOR  
IMMEDIATE STAY; MEMORANDUM OF POINTS AND  
AUTHORITIES; [SUPPORTING EXHIBITS FILED  
CONCURRENTLY HEREWITH]**

<input checked="" type="checkbox"/>	<b>VIA MAIL:</b> I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at San Francisco on this date, addressed as listed below.
<input checked="" type="checkbox"/>	<b>VIA FILE &amp; SERVE:</b> By causing a true and correct copy thereof to be served through File & ServeXpress addressed to all parties appearing on the File & ServeXpress Serve electronic service list.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on April 10, 2019.

By: /s/Alice M. Kay/  
Alice M. Kay/